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Guide to the Natural Resources Conservation Board Process

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Guide to the NRCB Process

Introduction

This guide explains the process used by Alberta's Natural Resources Conservation Board (the "NRCB" or the "Board") for the review of project applications. It is intended to assist members of the public who wish to participate (the legal term is "intervene") in an NRCB hearing, to provide relevant information to assist the Board in its deliberations whether in support or in opposition to a proposed project.

The NRCB responsibility is to provide a fair and open process for reviewing applications for certain non-energy projects affecting natural resources (discussed below) in Alberta. Individual members of the public, coalitions of people having a common position on a project, and organized public interest groups all have important roles to play in this process. Public participation helps to ensure that the NRCB has access to relevant and reliable information, and to the full range of views, when determining whether or not a given project is in the public interest.

In exercising its project review responsibilities, the NRCB is also concerned with the effectiveness and efficiency of the process. The NRCB is accountable to the Alberta Legislature, and ultimately to the taxpayers of the province, for the careful use of public funds. It must also ensure that the project review process does not impose unnecessary costs and delays on project proponents, or on interveners who prepare written submissions and take the time to attend hearings. All participants in the NRCB process, including the Board itself, have an interest in making the most effective use of limited resources (both time and money). This guide includes specific suggestions on how interveners can maximize the effectiveness of their parti-

cipation, and at the same time contribute to the efficiency of the NRCB process.

It should be emphasised that this guide is intended to summarize important aspects of the NRCB process and provide assistance to interveners on selected matters. It does not provide a detailed description of all elements of the process. The *Natural Resources Conservation Board Act* and the regulations under that Act (particularly the Rules of Practice) should always be referred to directly for the specific requirements at each stage of the process.

The Purpose of the NRCB

The NRCB was established by the Government of Alberta to provide an impartial review process for projects that will or may affect the natural resources (excluding energy resources) of Alberta. The NRCB mandate, as established by the *Natural Resources Conservation Board Act*, is to determine whether, in the Board's opinion, these projects are in the public interest, having regard for the social and economic effects of the projects and the effect of the projects on the environment.

It is clear that the NRCB is more than an environmental review board. In addition to assessing the environmental effects of a project, the Board must also consider potential social and economic impacts when determining whether a project is in the public interest.

NRCB Organization

The NRCB is a quasi-judicial tribunal created by the *Natural Resources Conservation Board Act*. The NRCB currently has a staff of nine. The Act provides that the Board must have between

three and five members. These members are appointed by Cabinet, which also designates both a Chairman and a Vice-Chairman. In addition to the full-time Board members, the Chairman may select acting Board members, when needed to assist in the performance of the NRCB duties, from a list of individuals nominated by Cabinet.

Reviewable Projects

The types of projects subject to NRCB review are listed in the *Natural Resources Conservation Board Act*. The Board's jurisdiction extends to forest industry projects, recreational or tourism projects, metallic or quarriable mineral projects, water management projects, and other specific projects designated by Cabinet. In particular, the following types of projects must receive approval from the NRCB prior to their commencement:

- 1) a project to construct a facility to be used to manufacture pulp, paper, newsprint or recycled fibre;
- 2) a project to construct a facility to be used to produce lumber, veneer, panelboard or treated wood for which an environmental impact assessment has been ordered;
- 3) a project to construct one or more facilities for recreational or tourism purposes for which an environmental impact assessment has been ordered;
- 4) a project to construct a mine or quarry or to work and recovery any metallic mineral or quarriable mineral as defined in the *Mines and Minerals Act* and the regulations under that Act for

which an environmental impact assessment has been ordered;

- 5) a project to construct a barrier that is of a height exceeding 15 metres to store water or water containing any other substance or to control the level of a body of water or water containing any other substance;
- 6) a project to construct a new canal capable of conducting 15 cubic metres or more of water or water containing any other substance;
- 7) a project capable of diverting 15 cubic metres or more of water or water containing any other substance; and
- 8) specific projects prescribed by Cabinet.

In cases where the NRCB's jurisdiction is triggered by an environmental impact assessment (EIA), the decision whether or not to order an EIA is made by Alberta Environmental Protection.

Environmental Impact Assessment (EIA)

Most applications that come before the NRCB will include an EIA. Indeed, in many cases the Board's jurisdiction to review a project is established only if an EIA has been directed by Alberta Environmental Protection.

The terms of reference for an EIA are defined within a process managed by Alberta Environmental Protection under the *Environmental Protection and Enhancement Act*. An important component of this process is the involvement of interested parties within the community in identifying issues of public concern that should be included in the review. The EIA process thus

provides an important opportunity for all parties to have input into the materials and studies that will be prepared by the project proponent. The NRCB encourages all individuals and groups to participate in this important component of the public review.

This guide does not describe the environmental impact assessment review process coordinated by Alberta Environmental Protection. It is important to note, however, that the NRCB and Alberta Environmental Protection work together to assure that they both receive all documents relating to the project review that are filed by an applicant or an intervenor. In addition, where proposed projects have implications for federal areas of responsibility, the federal government also coordinates its EIA process, and shares information, with Alberta Environmental Protection and the NRCB.

The Content of the Application

The requirements for an application to the NRCB are set out in the Board's Rules of Practice. These Rules include a schedule listing the general information to be included in every application to the Board, and appendices containing the specific information requirements for each type of project (e.g., forest industry, water management, etc.). The principal elements to be included in an application are:

° a description of the project, including detailed technical information regarding location, design, construction and operation;

- a discussion of the need for the project, project timing, natural resource inputs, products and waste by-products, and alternatives to the project (or to components of the project);

- an evaluation of environmental, social and economic impacts (including, where appropriate, how they will be monitored and mitigated);
- a description of the process used during the preparation of the application, including the EIA, to communicate with and involve stakeholders (i.e., residents of the region in which the proposed project would be located, owners and users of resources that would be affected, and other members of the public) and the manner in which those views and concerns have been reflected in the plans for the project; and
- the applicant's reasons for believing that the project is in the public interest and should be approved.

If an EIA was conducted for the project, it must also be included in the application to the Board.

The requirements for applications are intended to provide the NRCB and interested members of the public with information regarding the potential impacts of the project. On the basis of the application, the NRCB assesses whether more information is required and members of the public who are directly affected by the proposed project can decide if they want to file an objection, thereby triggering a public hearing to determine whether the project is in the public interest. The application requirements also indicate the types of issues that are relevant to the Board's evaluation of the project.

In preparing these specific requirements, the NRCB has recognized that each project will be different and that some of the items requested may not be relevant to a particular project. For

that reason, each appendix to the Rules of Practice includes a preamble stating that the applicant need provide the information only where it is applicable to the particular project.

Statutory Requirements Following Receipt of an Application by the NRCB

Once an application is filed with the NRCB, provisions included in the *Natural Resources Conservation Board Act* require the Board follow certain procedures in respect to persons who may be directly affected by a proposed project, and may be extended to others when the Board considers it necessary. In particular, the Board must give these persons:

- a reasonable opportunity to review the information relevant to the application submitted to the Board by the applicant and the other parties;
- a reasonable opportunity to furnish evidence that is relevant to the application or that is intended to contradict or explain information submitted to the Board by others;
- an opportunity to cross-examine (in the presence of the Board) persons submitting information relevant to the application, if cross-examination is necessary to provide a fair opportunity to contradict or explain the information presented by other parties; and
- an adequate opportunity to make arguments regarding the project to the Board.

The NRCB's review process, including notice provisions, public access to information, and the procedures for public hearings, ensures that

these privileges are respected. It should be noted, however, that except where cross-examination of other parties is required, there is no statutory requirement regarding oral submissions to the Board.

Person or Group "Directly Affected" by a Project

As noted above, the opportunity to review information and submit evidence and argument is extended to persons who may be "directly affected" by a proposed project. The directly affected test is also one of the eligibility criteria for intervenor funding, a topic discussed in a separate NRCB guide.

The term "directly affected" is not defined in the *Natural Resources Conservation Board Act*. Consequently, the meaning of this term is determined through interpretation by the Board. In its decision on the Three Sisters application for a tourism development near Canmore, the Board stated that:

... in order to directly affect an individual or group of individuals a project would have to cause a detectable effect on it or them. Such an effect could be beneficial or injurious. For illustration only, direct effects might act upon an individual's or group of individual's bodies or health, sustenance, livelihood, property, or statutory rights.

Since the Board's mandate is to determine whether proposed projects are in the public interest, its concern is with potential effects, not effects that have already occurred. The Board has stated that, to establish that a party is directly affected, there must be evidence acceptable to a reasonable person that:

- 1) a chain of causality exists;
- 2) an effect would probably occur; and
- 3) the effect would not be trivial.

In addition, the Board has defined a "closeness" test that requires demonstration of an uninterrupted chain of cause and effect between the proposed project and the individuals claiming to be directly affected. This test is most easily met in the case of individuals owning land or living within the vicinity of a proposed project.

The Board has also considered whether individuals can be considered directly affected when the proposed project will affect their use of public, as opposed to private, lands. In this context, the Board requires evidence of a chain of causality between the proposed project and effects on the use of public lands by the individuals or groups concerned. The Board has also stated that, to meet the directly affected test, it must be shown that these effects are not trivial.

In a Pre-Hearing Decision on the Kan-Alta Management Ltd. application for a golf course in Kananaskis Country, the Board identified two criteria for determining whether or not an effect on an individual's use of public lands should be considered trivial. The first concerns the distinctiveness of that individual's use of the lands. The second concerns the extent to which the opportunity for use that the lands provide is particularly unusual.

The first criterion requires that an individual or group demonstrate a use of the land that differs distinctly, either in kind or in degree, from that of the general public. For example, an individual whose livelihood depends in part on the use of a resource on public lands (e.g., the

gathering of fungi) could show that his or her use of that land differs in kind from use by the general public. An example of a difference in degree is the case of a licensed outfitter when compared to use of the same land by casual campers or hunters. A resident of the area affected by a proposed project might also be able to show a difference in degree by virtue of proximity and frequency of use. At a certain point, the use of land by an individual or group is sufficiently distinct from the use by the general population that the potential effect on that individual or group would not be trivial.

The second criterion for establishing that the effects are not trivial is met in cases where a project would affect public lands having a highly unusual and important feature that would not be readily available to users elsewhere in the province. An illustration would be the exposure of geological strata bearing unusual fossils.

In the Pre-Hearing Decision on the Chem-Security (Alberta) Ltd. Application for the receipt of hazardous waste from other Canadian jurisdictions the Board made a clear distinction between a person "who has an established interest" and one "who may be directly affected". The decision suggests that direct effects must be of a personal and individual nature and be "different, special or unique from effects that would apply to any other citizens living in Alberta".

It should be noted that while the "directly affected" test is relevant to a number of elements of the NRCB process, it is not a precondition for participation in that process. The Board has stated that anyone with an established interest in a proposed project may intervene at the hearing on the application.

Initial Review of the Application

Once an application is filed with the NRCB, Board staff conduct an initial review. The applicant may then be required to provide additional information to address deficiencies in the application. The Board staff also ensure that copies of the application have been provided to Alberta Environmental Protection and the federal government. At this stage, the NRCB staff, Alberta Environmental Protection, and the federal government each conduct a detailed and independent review of the application, including the EIA (if one has been done). In conducting their review, the Board staff may obtain assistance from independent consultants or from experts seconded to the Board from other government departments.

During the course of the initial review of an application by the Board staff, interested parties outside of the NRCB may find it desirable to make comments to the Board staff regarding potential problems that they see with the application. In addition, representatives from provincial and federal government departments, or from municipalities, are likely to forward comments to the Board staff. Any comments, concerns, or questions that are received are assessed by the Board staff in terms of their relevance to the Board's decision-making process and their relationship to the information requirements identified in the NRCB's Rules of Practice.

Once the Board staff has completed its review of the application, its concerns, as well as those identified by other parties that are found to be relevant to the proper functioning of the Board's process, are included in a letter requesting additional information from the applicant.

It should be understood that the function of the review conducted by the NRCB staff is to assess the information contained within the application for clarity and completeness. The initial review does not weigh the value of the information presented, since that is clearly the function of the Board. Indeed, if a staff member wishes to advocate a position or present evidence in respect of the application, then that staff member would have to do so as an intervener within the public hearing process. In practice, it is likely that Board staff would only intervene in the public process under exceptional circumstances. This type of intervention could result in restrictions on the person's performance of normal staff functions for the Board in regard to that particular application.

Notice of Application

The Board's practice is to publish a preliminary notice of application immediately following receipt by the NRCB of a project application. This preliminary notice may be published before the Board has determined whether supplementary information from the applicant will be required. The preliminary notice briefly describes the subject-matter of the application, states that the application is not yet completed, and provides the name and address of the applicant (or the applicant's solicitor or agent). The notice also states the time and place at which submissions concerning the application may be filed, and provides information on how copies of the application and supporting information can be obtained.

The formal notification process involves publishing the preliminary notice of application in weekly and daily newspapers in the region

where the proposed project is to be located. In addition to this formal process, the Board generally establishes a mailing list of people and organizations with an interest in the particular project and sends notices directly to them.

The Rules of Practice provide for publication of a "notice of application" (as opposed to a "preliminary notice of application") following receipt of a completed application, including any supplementary information requested as a result of the preliminary review by Board staff. This notice includes a statement that the project may be approved without a hearing if there are no submissions objecting to the application filed with the Board. Submissions must be filed by persons who the Board considers to be directly affected by the project, or who the Board determines have a bona fide interest in the matter. Individuals or groups who believe that a hearing should be held on an application should therefore submit a written objection to the Board within the time specified in the notice.

Upon receipt of the completed application, however, the Board's practice is generally to proceed directly with publication of a notice of hearing if it is aware of objections to the project. Objections should therefore be communicated to the Board following publication of the preliminary notice of application.

Triggering the Hearing Process

The NRCB is required to hold a hearing if it receives a written objection in respect of a project from a person who it considers to be directly affected by that project. The only exception to this rule is where the Board considers the objection to be vexatious or of little merit, in which case a hearing need not be held.

Letters objecting to the project should explain where the concerned persons live in relation to the proposed project, what their concerns are (a brief summary is sufficient), and what effects they believe the project may have. The letters need not be long, but must set out the basic reasons for objecting to the project. Letters must be received by the Board on or before the deadline for submissions included in the preliminary notice of application.

Notice of Hearing

Where a hearing on an application is to be held, notice of the hearing will be published at least 30 days prior to the hearing date. As with the preliminary notice of application, the notice of hearing will be published in local daily and weekly newspapers. In addition to this formal notification procedure, copies may be mailed directly to individuals and groups on the NRCB's mailing list for the particular project. The notice of hearing includes:

- a brief description of the subject-matter of the application;
- the time, date, and place of the hearing;
- information on how to obtain copies of the application and supporting information;
- the time and place for filing submissions with the Board;
- where the Board considers it appropriate, the time and place for notifying the Board of the intention to file a submission; and
- a statement that persons directly affected by the proposed project may

apply to the Board for funding to assist in the preparation and presentation of an intervention.

Access to the Application and Other Information

The preliminary notice of application and the notice of hearing include the address of the applicant (or the applicant's solicitor or agent) where the application and additional information may be obtained. They also provide the address of the public place where the application and information will be available, and the hours during which they may be viewed. This place is usually in a public building in the region of the province where the proposed project is to be located.

The Rules of Practice require the applicant to supply a copy of the application and supporting information to any person with an established interest in the matter. That material must be made available on request at any time from the publication of a notice until that last date provided for filing submissions (in the case of a notice of application) or the date for the hearing (in the case of a notice of hearing). The Board will settle any dispute that arises over whether a person requesting this material has an "established interest".

These provisions ensure that all persons who would be directly affected by the proposed project can obtain the application and supporting information, and that this material is available for review by any interested members of the public. In addition, interveners' submissions and supporting material are made available by the Board for examination at the public location set out in the notice of hearing.

Intervener Submissions

The Rules of Practice require that anyone wishing to intervene in a hearing must file seven copies of their submission with the Board within the time specified in the notice of hearing. A copy must also be provided to the applicant.

The submission must be signed (by the intervener or the intervener's solicitor or agent) and must contain the name and address of the intervener and an address in Alberta where communications may be sent to the intervener or the intervener's solicitor or agent. The submission must also contain a statement of:

- the disposition of the application that the intervener advocates, if any;
- the information the intervener proposes to present in evidence; and
- the reasons why the intervener believes the Board should decide the application in the manner advocated.

If the intervener's participation is to be confined to cross-examination and argument at the hearing, this intention should be stated in the submission. Finally, a submission containing a technical report or material of a technical nature should set out the qualifications of the person signing or taking responsibility for the report or material.

Interveners should ensure that all information for submissions is filed prior to the date referred to in the notice of hearing. After that date, additional material may be filed only at the request of, or with leave of, the Board. Interveners' submissions are made available by the Board for examination at the public location set out in the notice of hearing.

The written submission is the principal means for interveners to put information and arguments before the Board. As discussed below, participation in the hearing process may be limited to a brief summary of the submission, and responses to cross-examination by other parties. The written submissions are, however, read by the Board and taken into consideration when the decision report is prepared. Consequently, it is essential for effective participation that the submission contain a clear and concise statement of the intervener's position on the application and the reasons for that position. In addition, interveners may want to include reasonable alternatives to the project as proposed, suggestions to alleviate impacts, and conditions that might be imposed on the applicant should the project be approved. Intervenors should keep in mind that the Board's responsibility to decide whether or not a project is in the public interest means that it must take into account the interests of all Albertans.

Experience has shown that the following guidelines are helpful in preparing an effective submission:

- clearly state the desired disposition of the application and the arguments supporting that position;
- a submission that focuses on a few key issues or arguments is more effective than a shotgun approach that attempts to cover all bases;
- concentrate on information that is essential for the Board to reach a decision and on issues that are likely to have a significant impact on that decision (focus on "need to know" information);

- avoid including material that is peripheral to the main issues before the Board or that is unlikely to have a decisive impact on the Board's analysis of the proposed project (do not waste time on "nice to know" information);
- support all factual statements as fully as possible, and where possible avoid basing arguments on unsubstantiated assumptions or intuitions; and
- ensure that all of the evidence and arguments to be put before the Board are included in the written submission — the oral presentation to the Board (if the intervener wishes to make one) should only highlight the key points in the written material.

Finally, providing written submissions on computer diskette will assist the Board in reviewing the material and preparing the decision report.

Intervener Coalitions

Since participation in the NRCB process can take considerable time and effort, it may be advantageous to form a coalition with others sharing the same views. In addition to sharing the work load among participants, intervener coalitions can increase the efficiency of the NRCB process by reducing the number of individual submissions to be considered.

Pre-Hearing Meetings

The Board may convene one or more pre-hearing meetings with the applicant and interveners on its own initiative or at the request of a party to the proceeding. Pre-hearing meetings are relatively informal and are often held in

the region where the proposed project will be located, to facilitate participation by interveners. These meetings are used to discuss procedural matters with a view to promoting the efficient use of hearing time. Topics that may be addressed at pre-hearing meetings include:

- scheduling and location of the hearing;
- exchange of documents;
- use of witness statements;
- deadlines for interventions and responses;
- scope of matters to be considered at the hearing;
- special procedures to facilitate participation;
- intervener funding;
- familiarization of interveners with the Board's procedures;
- familiarization of interveners with the Board's mandate and jurisdiction; and
- discussion of opportunities for further dialogue among parties to resolve or narrow issues prior to the hearing.

Pre-hearing meetings offer an important opportunity for interveners to get involved in the hearing process at an early stage and to participate in shaping that process. They are also an important planning instrument for the Board. If used effectively, pre-hearing meetings can increase the efficiency of the hearing process for all parties.

Pre-Hearing Public Consultations

The NRCB expects project proponents to undertake public consultations beginning at the initial project design stage and continuing, if

necessary, right up to the time of the hearing. This policy is reflected in the application requirements set out in the appendices to the Rules of Practice. Applicants are required to describe the process used during the preparation of the application, including the EIA, to communicate with and involve the residents of the region in which the project is proposed, owners and users of resources that may be affected, and other members of the public. The applicant must also describe the manner in which those views and concerns were reflected in the plans for the project.

The purposes of pre-hearing public consultation are to define and, where possible, resolve contentious issues raised by the proposed project. Public consultation can significantly increase the efficiency of the NRCB process. In addition, it may lead to a consensual resolution of issues between the project proponent and other parties, an outcome that is in many ways preferable to the imposition of a solution by the Board following an adversarial public hearing. Public consultation can lay the groundwork for a positive ongoing relationship between the proponent and those persons who are affected by the project. For these reasons, the NRCB strongly recommends that all interested parties participate fully and in good faith in the pre-hearing public consultation process.

Ideally, a hearing will not be required if all of the concerns of directly affected persons are addressed through the consultation process. Even if all concerns cannot be addressed, the public consultations may narrow the range of issues to be considered at the hearing and clarify the available options and the positions of the parties. As a result, the length of the hearing will be reduced and its focus restricted to the critical issues.

The Purpose of the Hearing

NRCB hearings provide an open and public forum for the presentation and testing of technical, environmental, social, and economic evidence relating to proposed projects. They also permit the orderly expression of differing points of view by interested parties. In particular, hearings provide an opportunity for the applicant to explain the project to the Board and for people affected by it to state their support or objections in detail. Since participants are expected to present their evidence and arguments as clearly and completely as possible in their written submissions, a principal purpose of the hearing is to permit cross-examination as a means of contradicting or responding to submissions by other parties.

A full public hearing has undeniable benefits as a means of airing positions and evaluating evidence on contentious projects. However, hearings on complex projects can be costly and time-consuming for both the Board and the participants. Consequently, the NRCB is conscious of the need to ensure that, in addition to being open and fair, the public hearing process is as efficient as possible. From this perspective, the purpose of the hearing is to provide the Board with the evidence, arguments and points of view that are *necessary* for it to determine whether the project is in the public interest. The efficiency and effectiveness of the process depends on all participants keeping this objective in mind when preparing their submissions.

The Timing and Location of the Hearing

The NRCB attempts to hold its hearings at a time and location that will be convenient to those who wish to participate. For example, if a

major project is proposed for a farming area, the Board will attempt to avoid holding the hearing during spring planting or harvest times. Scheduling of the hearing will also depend on the length of time required for adequate preparation, and on the cost implications for the applicant and other parties.

Hearings are usually held in a meeting room or public hall in a community close to the location of the proposed project. In this way, participation by interveners from that region is made easier. When public hearings are not held locally, the Board may reimburse eligible interveners for reasonable travel expenses to the site of the hearing. The Board has stated that, in general, it does not believe that splitting a hearing on a single project between two locations would be an efficient procedure.

Overview of the Hearing Procedure

Although NRCB hearings are considerably less formal than courtroom litigation, they do provide a structured format for the presentation of information and argument. The hearing begins with opening remarks from the panel. These include a statement of the purpose of the hearing, the introduction of panel members and NRCB staff, and formal registration of participants. Preliminary matters, such as procedural or legal issues, are considered next. Each participant, beginning with the applicant, then presents evidence to the NRCB panel and responds to questions or cross-examination by other parties. Following submissions by interveners, the applicant is permitted to present rebuttal evidence. All parties then present final arguments to the Board, summarizing the principal issues and evidence and outlining the reasons why they believe that the Board should reach a particular decision regarding the application. The

interveners' arguments are heard first, and the applicant is then given an opportunity to present its rebuttal. Finally, the panel chairperson will close the hearing and, in most cases, announce the deferral of the panel's decision until the release of the decision report. (See Appendix A)

Participation in an NRCB Hearing

The Board has stated that all individuals or groups who have an established interest in the reviewable project and that wish to provide evidence about an application before the Board, or ask questions of other participants, are entitled to do so. All that is required is that they register and make themselves available to participate in the public hearing. Those wishing to participate should register with the Board within the time set out in the notice of hearing.

The Role of the Applicant

The applicant is expected to address all of the matters that the Board will need to take into consideration in order to arrive at its decision. In addition to describing the technical features of the project, the applicant should submit evidence and arguments regarding the social, economic, and environmental issues that are relevant to the Board's determination of the public interest. The specific information requirements for applications are set out in the NRCB Rules of Practice. The applicant's role at the hearing also involves responding to questions and cross-examination from the other participants. It may also seek to rebut evidence presented by interveners (or their expert witnesses) who oppose the proposed project.

The Role of Intervenors

Intervenors may participate in hearings either to support or to oppose an application, or simply to provide relevant information to the

Board. Participation may involve putting detailed written submissions before the Board, or it may be limited to cross-examination of other parties and presentation of final arguments. Since the written submissions should contain the substance of interveners' evidence and argument, a principal function of the hearing is to provide a forum for challenging or corroborating these submissions in the presence of the Board. The Board is particularly interested in the validity of the evidence before it and in the extent to which the assumptions and arguments made in submissions can be substantiated. Consequently, interveners make an important contribution at hearings through their responses to questions and cross-examination, and their role in testing the validity of submissions made by other participants.

The Role of Legal Counsel

NRCB hearings are relatively informal, and Board members have considerable expertise in understanding information and opinions expressed (orally, or in writing) by individual members of the public. It is not necessary, therefore, to hire a lawyer in order to participate effectively in a Board hearing. However, many interveners do make use of experienced legal counsel to present their cases, particularly if they seek to put complex evidence or legal arguments before the Board or if they want to cross-examine other participants. The decision whether or not to hire a lawyer must be made by each intervener on the basis of his or her objectives and level of comfort in participating directly in the hearing process.

The Role of Expert Witnesses

Expert witnesses may be used to present technical, scientific, socio-economic or environmental evidence or to rebut evidence presented

by other participants. The usefulness of expert witnesses will depend on the type and complexity of evidence to be presented and on the nature of the issues being addressed. While interveners need not rely on expert witnesses to present their evidence, the persuasiveness of that evidence will obviously be increased if it is supported by credible expert opinion. Submissions by experts must include the technical qualification of the person signing or taking responsibility for the report or material.

Funding for the Preparation and Presentation of Submissions

Effective participation in the NRCB process, particularly when legal counsel and expert witnesses are used, can involve considerable cost. The *Natural Resources Conservation Board Act* and regulations under that Act provide for intervener funding under certain circumstances. These sections should be referred to directly for the specific funding criteria and procedures. The NRCB has prepared a guide dealing specifically with intervener funding.

Presentation of Submissions and Evidence at the Hearing

The Rules of Practice establish basic guidelines for presentations at NRCB hearings. As a general rule, presentations must be made by witnesses who prepared the submission, supervised or participated substantially in its preparation, or otherwise have special knowledge of the submission. In the case of technical material, the technical qualifications of the witness must be presented.

The Rules of Practice also place limits on the content of presentations. Oral presentations must be confined to matters set out in the written

submission, unless the Board directs otherwise. Direct evidence can only be presented to establish allegations in the application or in the submission of the person presenting that evidence, or if it arises from evidence presented in cross-examination. Finally, the Board will not hear arguments unless they are based on evidence before it.

It should be emphasised that written submissions alone are an acceptable form of participation in NRCB hearings. Oral presentation is not necessary in all circumstances. Where the Board or other participants require clarification on a written submission, however, the party making that submission may be asked to respond to questions. Requests of this type from other participants are channelled through the Board.

Presentations at NRCB hearings can be an effective way of highlighting important information and arguments, and testing the submissions of other parties. However, experience has also shown that lengthy, un-focused and repetitive presentations can be costly in terms of time and money (both for the intervener who prepares the presentation, and for the Board and other parties present at the hearing), without assisting the Board in deciding the issues before it. Consequently, the Board recommends that interveners keep the following points in mind when considering oral presentations at hearings:

- an oral presentation may not be necessary if the intervener's position and evidence are clearly stated in the written submission (the intervener should, however, be available for cross-examination on the submission if required);

- oral presentations should be brief (normally less than 20 minutes) and limited to highlighting the most important evidence and arguments in the submission (remember that the Board will have the written submission to consider when reaching its decision and drafting the decision report); and
- as with a written submission, focusing on a few key points is more effective (and efficient) than a shotgun approach.

Tendering Documents During a Hearing

Participants may want to tender the documents on which they rely as exhibits at the hearing. Since the NRCB process seeks to avoid surprise by requiring full disclosure of evidence and arguments prior to the hearing, documents to be entered as exhibits should generally be tendered at the same time as the written submissions (i.e., by the deadline established for those submissions). Another alternative that may be acceptable in some cases is to include the specific excerpt to be relied on with the written submission. The entire document can then be presented at the hearing if it is required to put the excerpt in context. Tendering the full document prior to the hearing is less essential if it is clearly identified in the written submission and is publicly available. In contrast, documents that are not readily available should be tendered in advance if they are to be entered as exhibits at the hearing.

Cross-Examination

Cross-examination is the questioning of a witness called by an opposing party in the hearing, following the presentation of his or her evidence. There are three principal purposes of cross-examination:

- to weaken, qualify, or completely discredit the evidence presented by the witness by challenging its soundness (e.g., scientific or technical validity), the assumptions upon which it is based, or its logic and internal consistency;
- to show that evidence presented by the opposing witness can in fact support one's own case; and
- to discredit the opposing witness (e.g., by challenging his or her professional qualifications, expertise, objectivity, direct knowledge of the particular issues before the Board, recollection of relevant events, etc.).

The Rules of Practice state that witnesses can only be cross-examined by or on behalf of an applicant, an intervener, or the Crown. Cross-examination is an important component of the NRCB hearing process because it allows participants to test conflicting evidence and competing arguments before the Board. The *Natural Resources Conservation Board Act* specifically provides that persons directly affected by a proposed project, and other persons where the Board considers it necessary, shall be given the opportunity to contradict or explain information presented by the applicant and other interveners.

As with other forms of participation in the NRCB process, cross-examination should follow certain guidelines if it is to be conducted in an effective and efficient manner. In particular:

- participants should engage in cross-examination only where this will achieve a clear benefit (such as directly contradicting, or undermining the persuasiveness of, the evidence or arguments of another party);

- cross-examination should only be done where the answer to be obtained will be directly helpful to the Board in its disposition of the application (cross-examination on minor details or peripheral matters is unlikely to be helpful);
- participants should be familiar with the other parties' submission before engaging in cross-examination, since the question raised in cross-examination may already have been answered;
- participants should refrain from cross-examination directed at submissions with which they are in agreement, since these "sweetheart cross-examinations" generally do not assist the Board (by contradicting or further explaining evidence or argument) and may consume considerable amounts of hearing time;
- participants should not be surprised that all parties will not reach the same conclusions, and should focus cross-examination on matters of fact rather than on interpretation; and
- participants should not use cross-examination as a means of presenting final argument, nor should cross-examination be turned into a debate.

Final Argument

In presenting final arguments, participants should clearly and succinctly state what they view as the most important issues before the Board. They should also briefly summarize the reasons for the conclusion that they believe the

Board should reach on these issues, and on the application as a whole. The final argument should not introduce new evidence or revisit in detail the participant's submission.

The Board's Decision-Making Authority

The Board has considerable latitude in deciding on applications. It may, with prior authorization from Cabinet, grant an approval on any terms and conditions that the Board considers appropriate. In addition, it may refuse to grant an approval, defer consideration of an application (on terms and conditions determined by the Board), or dispose of the application in any other way that it considers to be appropriate. In sum, the Board has authority on its own to reject or defer applications, but the approval of applications requires Cabinet authorization. That authorization may also include terms and conditions imposed by Cabinet.

The Decision Report

Following a public hearing, the NRCB reviews all of the evidence presented before it reaches a decision. The decision is made public in the form of a decision report. This report is written by the panel members and the time required for its release depends on its length and complexity.

In the decision report, the Board provides background information on the project, summarizes the application and supporting information, reviews the positions of the other participants, explains its conclusions on each of the issues before it, and sets out its disposition of

the application. If the application is approved, any terms and conditions imposed by the Board are stated in the decision report.

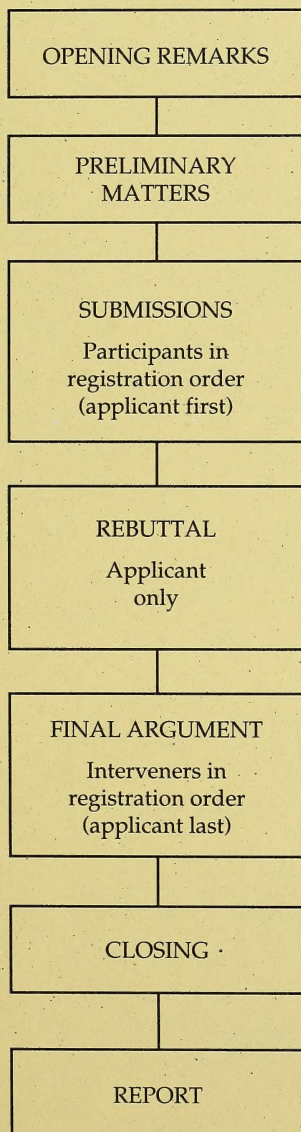
The NRCB Decision and Other Approval Processes

Approval by the NRCB does not dispense with the need to obtain any licenses, permits, approvals, or other authorizations from other government departments, agencies, or municipalities having regulatory authority over the project.

Appeals

Board decisions may only be appealed on questions of jurisdiction or law. Appeals must be made to the Alberta Court of Appeal. For an appeal to succeed, it would be necessary to show that the Board had misconstrued its authority under the *Natural Resources Conservation Board Act* (e.g., did not have legal authority to make the decision) or had failed to respect the legal requirement of procedural fairness in quasi-judicial hearings. The Act contains specific provisions governing appeals.

NRCB Hearing Procedure*



- The purpose of the hearing is stated.
- Panel and staff are introduced.
- Participants are registered.
- Note order of registration - applicant is registered first.

- Any procedural, legal, or similar matters are considered.

For each submission:

- Documents are registered as exhibits.
- Witnesses are introduced and credentials presented.
- The submission is highlighted by the witnesses.
- Witnesses are examined (questioned to clarify their submissions or statements):
 - by other participants, in order of registration;
 - by NRCB staff;
 - by the panel.
- Examination is re-directed (that is, additional clarifying information may be presented by the witness).
- Applicant may submit rebuttal evidence to address points raised during the submissions of other participants. Examination by other participants is permitted, but only on the additional evidence presented.
- Interveners are not allowed rebuttal, as their submissions are made after the applicant's and they have opportunity at that time to rebut the applicant's submission.

- Participants may state what they believe are the most important aspects of the matters to be considered and the reasons for the conclusions they believe the panel should come to.
- Following the interveners final argument, the applicant has an opportunity to rebut the interveners' argument.
- Panel chairpersons will usually announce deferral of the panel's decision.
- Later, a report stating the decision and the reasons for it is distributed to all registered participants and made available to the public.

* Adapted from ERCB Guide G-29



For more information

If you have any questions regarding the NRCB, please call.



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If you are calling from outside of Edmonton, please use the Government RITE line and ask for our number to avoid long distance charges.

Other Publications Available from the NRCB

- NRCB Act
- NRCB Rules of Practice Regulations
- A Review of Activities 1991-1993 and Plans for 1994-96
- A Guide to the NRCB Process
- A Guide to Intervener Funding



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